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Nos. 95-1672 and 95-1881

In the Supreme Court of the United States

OCTOBER TERM, 1995

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Communications Commission's revocation of petitioners' construction permit was excepted from the automatic stay provision of the federal bankruptcy code as "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," 11 U.S.C. 362(b)(4).

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 5a-8a) affirming the final order of the Federal Communications Commission (FCC) is unpublished, but the decision is noted at 70 F.3d 639 (Table).

The final order and decision of the FCC (95-1881 Cross-Pet. App. 59a-93a), revoking petitioners' construction permit and disqualifying cross-petitioners

as broadcast permittees or licensees, are reported at 8 F.C.C. Rcd. 4192. Orders of the FCC denying a petition for reconsideration (Cross-Pet. App. 94a-103a) and denying review (Cross-Pet. App. 108a-109a) are reported at 8 F.C.C. Rcd. 8719 and 9 F.C.C. Rcd. 4477, respectively. An order denying a second petition for reconsideration (Cross-Pet. App. 104a-107a) is unreported. The initial decision of the administrative law judge (Cross-Pet. App. 1a-58a) is reported at 7 F.C.C. Rcd. 7819.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1995. A petition for rehearing was denied on November 17, 1995. Pet. App. 10a. Petitioners filed a petition for a writ of certiorari on February 14, 1996, and by letter of the Clerk of the Court dated February 15, 1996, were granted leave to refile by April 15, 1996. The petition was refiled by that date and docketed on April 17, 1996 (No. 95-1672). Cross-petitioners filed a conditional cross-petition for a writ of certiorari on May 17, 1996 (No. 95-1881). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC or Commission) exercises regulatory authority over the radio spectrum pursuant to the Communications Act of 1934, 47 U.S.C. 151 *et seq.* The Act charges the FCC with "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act further

provides that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.*; see *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

The grant of a license confers a limited right, and the FCC retains regulatory authority over the use of the license during the license term. Licensees are required to comply with restrictions set forth in Title III, Part I of the Act, 47 U.S.C. 301-336, and governing regulations, 47 C.F.R. Pt. 73. A license may be suspended, modified, or revoked for violation of those rules. 47 U.S.C. 312(a). Furthermore, transfer or assignment of the license during the license term, as well as renewal of the license, are subject to FCC approval. 47 U.S.C. 307(c), 309(h) and (k), 310(d). Section 307(a) directs the Commission to exercise its licensing authority in the "public convenience, interest, or necessity." 47 U.S.C. 307(a); see also *Regents of Univ. Sys. of Georgia* v. *Carroll*, 338 U.S. 586, 598 (1950).

2. The automatic stay provision of the Bankruptcy Code, 11 U.S.C. 101 *et seq.* (Code), provides for a broad stay of litigation, lien enforcement, and other actions that would interfere with the property of a debtor's estate. 11 U.S.C. 362(a). In particular, Section 362(a)(1) provides that the filing of a petition in bankruptcy operates as a stay of "the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." 11 U.S.C. 362(a)(1). Section 362(a)(2) stays "the enforcement,

against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title." 11 U.S.C. 362(a)(2). The purpose of the stay is twofold: to provide the debtor a "breathing spell" from his or her creditors, and to protect creditors from a race on the debtor's assets. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

The automatic stay is not absolute, however, and Congress has enumerated a series of exceptions in 11 U.S.C. 362(b). In particular, the filing of a petition in bankruptcy does not operate as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4). Likewise, the statute precludes a stay "under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(5). Together, those provisions permit a governmental body to commence, continue, and enforce an action against the debtor or his or her estate, where that governmental body is acting to protect its regulatory, rather than purely pecuniary, interests.

3. Petitioners in this case are Black Television Workshop of Los Angeles, Inc. (BTW), a non-profit corporation, and Arnold L. Kupetz, its trustee in bankruptcy. Conditional cross-petitioners have all served as officers and directors of BTW. In 1983, the FCC granted BTW a construction permit for

a noncommercial television station.[1] Several years later, three members of BTW's board of directors notified the FCC of a dispute over control of the corporation, and an FCC investigation revealed substantial questions concerning BTW's qualifications to be a permittee or licensee. After a lengthy hearing, an administrative law judge revoked BTW's construction permit, pending appeal. 95-1881 Cross-Pet. App. 1a-58a. The ALJ found, *inter alia*, that there had been an unauthorized transfer of control of BTW, in violation of 47 U.S.C. 310(d), and that BTW's initial applications and subsequent dealings with the Commission were "replete with instances" of misrepresentations and lack of candor. *Id.* at 47a-49a. On appeal, the Commission upheld the findings and conclusions of the ALJ. *Id.* at 59a-93a. A subsequent petition for reconsideration was denied, *id.* at 94a-103a, as were a further petition for reconsideration, *id.* at 104a-107a, and a self-styled application for review, *id.* at 108a-109a.

BTW sought review in the court of appeals and, on the same day, filed a petition in the bankruptcy court for reorganization under Chapter 11 of the Code. BTW then filed a motion for remand in the court of appeals, arguing that the automatic stay provision of the Code precluded the FCC from taking further action concerning the revocation of BTW's construction permit. In a brief, unpublished order, the court

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[1] Pursuant to 47 U.S.C. 319(a), the FCC licensing process is initiated by the grant of a construction permit. Upon completion of the station within the time specified, and upon a showing that the permit's terms, conditions, and obligations have been satisfied, the Commission will grant the permittee a license in the public interest. 47 U.S.C. 319(c).

denied the motion, holding that "[t]he [FCC's] action is excepted from the automatic stay provisions of the bankruptcy code." Pet. App. 2a (citing 11 U.S.C. 362(b)(4)). BTW then filed a motion for rehearing and suggestion for rehearing *in banc* concerning the motion to remand, which the court of appeals denied. *Id.* at 4a. During this time, BTW's bankruptcy case was converted to a Chapter 7 liquidation proceeding, and Kupetz was appointed trustee.

After argument on the merits, the court of appeals affirmed the decision of the FCC in a brief, unpublished judgment, finding "ample evidence on the record to support the FCC's decisions." Pet. App. 6a-7a.[2] One month after the court entered its judgment, and eight months after his appointment in the bankruptcy case, Kupetz filed his first appearance in the court of appeals, seeking substitution of parties, vacatur of the court of appeals' judgment, and remand to the FCC to permit negotiation of a settlement. BTW also filed a petition for rehearing and suggestion for rehearing *in banc*. In unpublished orders, the court of appeals denied both Kupetz's motion and BTW's petition. *Id.* at 9a, 10a, 11a.

ARGUMENT

Petitioners' objections to the court of appeals' ruling lack merit. The court of appeals' decision is consistent with the rulings of this Court and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly concluded that "[t]he [FCC's] action is excepted from the automatic

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[2] The court did not revisit its earlier ruling on the non-applicability of the automatic stay.

stay provisions of the bankruptcy code." Pet. App. 2a (citing 11 U.S.C. 362(b)(4)). Section 362(b)(4) provides that the automatic stay does not apply to the commencement or continuation of a proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. 362(b)(4).

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978).

Section 362(b)(5) works in tandem with Section 362(b)(4), to permit entry of all judgments and enforcement of all non-monetary judgments obtained under Section 362(b)(4).

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it pref-

> erential treatment to the detriment of all other creditors.

S. Rep. No. 989, *supra*, at 52.

Courts have applied two tests, the "pecuniary purpose test" and the "public policy test," to determine whether particular governmental actions are entitled to the regulatory powers exception to the automatic stay provision. The pecuniary purpose test asks whether the governmental action relates primarily to matters of the public interest, health, and safety, or rather merely to the protection of the government's pecuniary interest in the debtor's property. See, *e.g.*, *NLRB* v. *Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir. 1991); *Eddleman* v. *United States Dep't of Labor*, 923 F.2d 782, 790 (10th Cir. 1991); *United States* v. *Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988). The public policy test distinguishes between governmental proceedings that aim to effectuate public policy and those that adjudicate private rights. *Continental Hagen*, 932 F.2d at 833; *Eddleman*, 923 F.2d at 790; *Nicolet*, 857 F.2d at 209. Both tests aim at discerning whether the governmental unit is acting in a regulatory capacity—to effect compliance with laws that it administers—or in a pecuniary or "private" capacity—to recover money owed it as a creditor.

Only in the latter case does the governmental unit stand in the position of any other creditor, such that its efforts to obtain a monetary judgment will be subject to the stay. By contrast, in the former case the action will fall squarely within the exception carved out by Section 362(b)(4). See *Continental Hagen*, *supra* (since enforcement of unfair labor practice laws satisfies both tests and is excepted from

stay, entry of cease and desist order and monetary relief permissible, though enforcement of monetary relief stayed); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986) (unfair labor practice proceeding excepted from stay); *Penn Terra Ltd.* v. *Department of Envt'l Resources*, 733 F.2d 267 (3d Cir. 1984) (enforcement of state environmental protection statute excepted from stay); *In re Missouri* v. *United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981) (enforcement of State's grain laws, where primarily related to protection of State's pecuniary interest in debtor's property, not excepted from stay), cert. denied, 454 U.S. 1162 (1982).

The court of appeals here correctly applied the plain language of the statute, which exempts actions involving a "governmental unit's police or regulatory power[s]" from the automatic stay. 11 U.S.C. 362(b)(4) and (5). As this Court has recognized, "the Commission's regulatory powers center around the grant of licenses." *Carroll*, 338 U.S. at 599. The Commission is directed to exercise that power in the "public convenience, interest, [and] necessity." 47 U.S.C. 307(a); see *Carroll*, 338 U.S. at 598. When the Commission acts to enforce compliance with its governing statute and regulations, and to assure use of the radio spectrum in the public interest, it acts to protect its regulatory, rather than pecuniary, interests. The FCC's action revoking BTW's construction permit was purely regulatory in nature, and thus is exempt from the stay.

The judgment of the court of appeals is also consistent with interpretations of the governmental regulatory powers exception made by other federal courts. In many analogous contexts, courts have held that various license revocation-type actions fall

within the governmental regulatory powers exception to the automatic stay. See, *e.g.*, *In re Wade*, 948 F.2d 1122 (9th Cir. 1991) (disciplinary proceedings against attorney excepted from automatic stay); *In re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985) (revocation of status permit for operation of hazardous waste site excepted from stay); *In re Carlton Fruit Co.*, 86 B.R. 254 (Bankr. M.D. Fla. 1988) (imposition of conditions upon citrus dealer's license excepted from automatic stay); *In re Sam Daily Realty, Inc.*, 57 B.R. 83 (Bankr. D. Haw. 1985) (suspension of realtor's license and imposition of judgment of fine excepted from automatic stay; enforcement of payment of fine subject to stay); *In re Arminio*, 38 B.R. 472 (Bankr. D. Conn. 1984) (revocation of driver's license excepted from automatic stay).[3]

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[3] This Court's decision in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), is not to the contrary. *MCorp* held that administrative proceedings by the Board of Governors of the Federal Reserve to enforce regulations concerning the operation of bank holding companies are excepted from the automatic stay under Section 362(b)(4). In its argument, MCorp had contended that the "ultimate objective" of the proceedings was to "exercise control of corporate assets." *Id.* at 40. Hence, MCorp asserted, Section 362(a)(3), staying any act to obtain possession of, or to exercise control over, property of the estate, precluded continuation of the administrative proceedings.

This Court ruled that Section 362(b)(4) clearly permitted the government to continue its enforcement proceedings. The Court stated that "[i]t is possible, of course, that the Board proceedings * * * may conclude with the entry of an order that will affect the Bankruptcy Court's control over the property of the estate." 502 U.S. at 41. The Court suggested that "[i]f and when" an order were entered interfering with

b. Despite the clear language of the statute, petitioners argue (Pet. 8-9) that a stay of any FCC revocation proceeding against a federal bankruptcy debtor is necessary "to protect creditors." In particular, petitioners assert (Pet. 9-10) that Section 362(b)(4)'s reference to "police or regulatory power" encompasses "enforcement of laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with control of the *res* or property by the bankruptcy court." That argument lacks merit.

Petitioners' argument is not supported by *In re Missouri* v. *United States Bankruptcy Court*, *supra*. That case addressed the ability of the State to seize and sell grain in the possession of the debtor. The court of appeals found that the grain laws that the State sought to enforce were "*primarily relate[d] to the protection of the pecuniary interest* in the debtors' property and not to matters of public safety or health." 647 F.2d at 776 (emphasis added). The court's general statement concerning "regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court," *ibid.*, thus has no bearing upon a case such as the instant one in which a substantial non-pecuniary regulatory interest is found to exist.

Petitioners also invoke (Pet. 12) *NLRB* v. *Continental Hagen Corp.*, *supra*, to bolster their

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the property of the estate in violation of Section 362(a)(3), "then it may well be proper" for the bankruptcy court to exercise concurrent jurisdiction. Petitioners' claim (Pet. 13)—that any final agency action "adversely affecting the license of [a] regulated business" may require a stay—does not follow from *MCorp*, which neither concerned a license revocation proceeding nor addressed the statutory provisions at issue here.

claim that a regulatory action must be stayed if enforcement "would be detrimental to creditors." That case does not support that proposition. Rather, *Continental Hagen* illustrates the distinction between the government as regulator and the government as creditor. The court of appeals recognized the authority of the NLRB to enforce its unfair labor practice laws, not only through the issuance of cease and desist orders, but also by ordering monetary relief. Noting, however, that *enforcement* of the monetary relief would be stayed—a proposition not contested by the government—the court of appeals relied upon the monetary judgment limitation of 11 U.S.C. 362(b)(5). Despite petitioners' assertion to the contrary (Pet. 12), the court made no reference to any generalized prohibition against enforcement where enforcing a judgment would be "detrimental to creditors."

Indeed, no court of appeals has ruled that the Code stays regulatory action otherwise permitted by the plain language of Section 362(b)(4) and (5) merely because of a "detrimental effect" upon creditors. The courts have acknowledged that, although the goal of preserving the corpus of the debtor's funds and estate is normally central to the statutory scheme, that policy may conflict with other important governmental goals. See, *e.g.*, *Eddleman*, 923 F.2d at 790 ("We must assume that Congress chose its language [in Section 362(b)(4)] with the full recognition that the exception would allow governmental actions to encroach on the court's control of debtors' affairs."). "In enacting the exceptions to section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities." *Penn Terra*, 733 F.2d at 278 (rejecting argument that State could

not enforce its environmental laws against debtor where compliance with injunction required expenditure of money to detriment of creditors); see also *In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988) ("[W]e decline to adopt [the] premise that preservation of the debtor's estate is of greater priority in the statutory scheme set forth by Congress in Title 11 than is the enforcement of environmental protection laws explicitly intended to be excepted from the automatic stay."). As the courts have recognized, despite the possibility of indirect effects upon creditors, Congress chose to establish express exceptions to the automatic stay.

2. a. Petitioners suggest (Pet. 9-11) that the opinion of the court of appeals is in conflict with a decision of a district court. However, the proposition cited by petitioners is contained in dicta, and any "conflict" created by the dicta of a district court does not warrant review by this Court.

In re Fugazy Express, Inc., 124 B.R. 426 (S.D.N.Y. 1991), appeal dismissed, 982 F.2d 769 (2d Cir. 1992), involved proceedings by a purchaser of an FCC license at an authorized trustee's sale against an unauthorized, but earlier, post-petition transferee. Not aware of the bankruptcy proceedings, the FCC had approved the first assignment of the license. Deciding who controlled the debtor's interest in the license post-petition, the district court acknowledged two critical facts: (1) any interest in the license was limited by the regulatory authority of the FCC, and (2) on the facts of the case, the question of the application of the stay provisions to regulatory proceedings by the FCC was not before the court. 124 B.R. at 431.

The court nevertheless asserted that "[t]he revocation of a license by the FCC does not affect the health or safety of the public, so there is no exemption to the stay under [Section 362(b)(4)]." 124 B.R. at 431. In light of the district court's express recognition that the applicability of the stay provisions to FCC regulatory proceedings was not before it, this statement is sheer obiter dicta. *Fugazy* thus has no bearing in fact or law on the question presented in this case.

b. Petitioners also argue that the decision of the court of appeals conflicts with FCC policy, as previously upheld by the court of appeals. Petitioners cite (Pet. 11) *Second Thursday Corp.*, 22 F.C.C.2d 515, recon. granted, 25 F.C.C.2d 112 (1970), for the proposition that the FCC must concur with a stay and defer to the bankruptcy court in order to protect creditors. *Second Thursday* is inapposite.

That case involved an application, by the licensee's trustee in bankruptcy, for assignment of the license to a bidder at auction, where allegations of wrongdoing had been made against the licensee but no adjudication had yet occurred. In such circumstances, where a proposed assignment is pending and claims against the licensee have not been adjudicated, the Commission has found that protecting innocent creditors is one factor to consider in approving the assignment, so long as the alleged wrongdoers would receive no benefit from the FCC's action. *Second Thursday* does not stand for the proposition that the FCC will stay all regulatory enforcement action against a licensee merely because the licensee has entered bankruptcy. Where wrongdoing has been clearly established and finally adjudicated, the FCC has a strong interest in assuring enforcement of its

governing statute and regulations in order to protect the public interest committed to the agency's charge.

3. Because the petition for a writ of certiorari should be denied for the foregoing reasons, this Court's Rule 13.4 requires that the conditional cross-petition also be denied.[4]

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] In any event, we note that the conditional cross-petition attempts to relitigate the facts of the construction permit revocation proceeding. Cross-petitioners' contentions were addressed in the initial decision of the administrative law judge, Cross-Pet. App. 1a-58a, and the decision of the full Commission, *id.* at 59a-93a, and the court of appeals correctly found "ample evidence on the record" to support the FCC's decisions, Pet. App. 6a-7a. None of cross-petitioners' fact-bound claims would warrant review by this Court.